QUESTIONS AND ANSWERS CONCERNING RESPONSE TO *WESTERN STATES PAVING COMPANY v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION*.

QUESTION: To Whom Do these Questions and Answers Apply?

ANSWER:

* These questions and answers apply only to recipients of Federal financial assistance from the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA) located in the states comprising the 9th Federal Judicial Circuit. These states are California, Oregon, Washington, Alaska, Arizona, Idaho, Montana, Nevada, and Hawaii.

* These questions and answers do not apply to recipients in other states.

* These questions and answers apply only to the disadvantaged business enterprise programs (DBE) of recipients of Federal financial assistance governed by 49 CFR Part 26.

QUESTION: What did the Court say in Western States?

ANSWER:

* Like all Federal courts that have reviewed the Department of Transportation's DBE program, the 9th Circuit panel found that 49 CFR Part 26 and the authorizing statute for the DBE program in TEA-21 were constitutional. The court affirmed that Congress had determined that there was a compelling need for the DBE program and the Part 26 was narrowly tailored.

* The court agreed that Washington State did not need to establish a compelling need for its DBE program, independent of the determinations that Congress made on a national basis.

* However, the court said that race conscious elements of a national program, to be narrowly tailored as applied, must be limited to those parts of the country where its race-based measures are demonstrably needed.

* Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry.

* In addition, even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those groups that have actually suffered discrimination or its effects.

* The court concluded that Washington State DOT's DBE program was not narrowly tailored because the evidence of discrimination supporting its application was inadequate. The court mentioned several ways in which the state's evidence was insufficient:

+ Washington State DOT had not conducted statistical studies to establish the existence of discrimination in the highway contracting industry that were completed or valid.

+ Washington State DOT's calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation

+ The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination.

+ A small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts (2.7% in the case of Washington State DOT) was entitled to little weight as evidence of discrimination, because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work.

+ This small statistical disparity is not enough, standing alone, to demonstrate the existence of discrimination. To demonstrate discrimination, a larger disparity would be needed.

+ Washington State DOT did not present any anecdotal evidence of discrimination.

+ The affidavits required by 49 CFR 26.67(a), in which DBEs certify that they are socially and economically disadvantaged, are not evidence of the presence of discrimination.

* Consequently, the court found that the Washington State DOT DBE program was unconstitutional as applied.

* The court cited the 8th Circuit's decision in *Sherbrooke Turf* v. *Minnesota Department of Transportation*. In that case, the court said, Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets, which the 8th Circuit had

relied on in holding that the two states' DBE programs were constitutional as applied.

QUESTION: What action should recipients take with respect to submitting their overall goals for FY 2006?

ANSWER:

* Recipients should examine the evidence they have on hand of discrimination and its effects. Does this evidence appear to address successfully the problems the 9th Circuit's decision articulated concerning the Washington State DOT DBE program?

* If the recipient currently has sufficient evidence of discrimination or its effects, the recipient should go ahead and submit race- and gender-conscious goals where appropriate, as provided in Part 26. (This submission would include the normal race conscious/race-neutral "split" in overall goals.)

* If the evidence of discrimination and its effects pertains to some, but not all, of the groups that Part 26 presumes to be socially and economically disadvantaged, then these race- and gender-conscious goals should apply only to the group or groups for which the evidence is adequate.

* If necessary, the Department will entertain program waivers of Part 26's prohibition of group-specific goals in this situation.

* If the recipient does not currently have sufficient evidence of discrimination or its effects, then the recipient would submit an all-race neutral overall goal for FY 2006. The recipient's submission would include a statement concerning the absence of adequate evidence of discrimination and its effects.

* A race-neutral submission of this kind should include a commitment to promptly conduct a study or other appropriate evidence-gathering process to determine the existence of discrimination or its effects in the recipient's market. An action plan describing the study and time lines for its completion should also be included. Operating administration approval of the race-neutral goal will be conditioned on the submission of a good faith, reasonable, and timely action plan for this study.

* The Department's operating administrations are willing, in response to recipients' requests, to extend the time for submitting FY2006 goals for a time sufficient to allow recipients to evaluate the adequacy of their current evidence of discrimination or its effects.

* Operating administrations will review recipients' annual goal submissions to determine whether recipients have provided evidence of discrimination or its effects.

QUESTION: Should recipients who will be submitting all race-neutral overall goals for FY 2006 because they do not have sufficient evidence of discrimination or its effects make any changes to contracts issued during FY 2005 or earlier?

ANSWER:

* No. Even where FY 2005 contracts used race-conscious contract goals, we do not believe it is appropriate to attempt to revise or reform those contracts.

QUESTION: If recipients will be operating an all-race neutral DBE program in FY2006 or subsequent years, what should such a program include?

* With few exceptions, generally there is no difference in how the DBE program regulations apply to a race- and gender-neutral program (hereafter race-neutral) as compared to a race- and gender-conscious program (hereafter race-conscious).

* In a wholly race- neutral program (e.g., the annual overall DBE goal has been approved with no portion of it projected to be attained by using race- and gender-conscious means) the recipient does not set contract goals on any of its US DOT-assisted contracts for which DBE subcontracting possibilities exist. Recipients having an all race-neutral program are not required to establish contract goals to meet any portion of their overall goal,

* Recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR 26.51(b) as possible to meet the overall goal and to demonstrate that you are administering your program in good faith. The Department expects that recipients using all race-neutral programs will aggressively use methods such as unbundling of contracts, technical assistance, capital and bonding assistance, business development programs, etc. It is not enough to wait passively for DBEs to participate.

* The good faith efforts requirements in 49 CFR 26.53 that apply when DBE contract goals are set have no required application to recipients implementing a race-neutral program. However, recipients must continue to collect the data required to be reported in the Uniform Report of DBE Awards or Commitments and Payments Form (see §26.11) and to monitor compliance with the commercially useful function requirements.

* The prompt payment and retainage requirements of 49 CFR 26.29 are race-neutral mechanisms designed to benefit all subcontractors, DBEs and non-DBEs alike. Recipients using all race-neutral programs must continue to implement them.

* The requirement that DBEs must perform a commercially useful function to receive credit toward the overall goal applies to race neutral programs just as it does to programs that use race-conscious means to meet program objectives.

* It is essential that recipients maintain an effective monitoring and enforcement program to track DBE participation obtained through race neutral means that the recipient claims credit (see 49 CFR 26.37 (b)).

QUESTION: What must recipients do that have already submitted their FY 2006 goals to modal administrations for approval?

ANSWER:

* If the appropriate modal administration determines that the FY 2006 DBE goal submission does not contain the kind of information or documentation suggested by this guidance that would comport with the law established by the Ninth Circuit Court of Appeals, the recipient will be directed to revise and resubmit its DBE goal submission consistent with this guidance.

QUESTION: Will the process used by the modal administrations to review and approve goal submissions made by recipients in the Ninth Circuit change?

* Yes for FHWA recipients. The FY 2006 DBE goal submissions will require concurrence by the FHWA Office of Civil Rights and a legal sufficiency review by the Office of Chief Counsel in Washington, D.C. before approved by the appropriate FHWA division office.

* FTA

* FAA

QUESTION: If a recipient lacks sufficient evidence of discrimination or its effects, what should it do to remedy the problem?

ANSWER:

* A recipient in this situation should immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects.

* The Department expects recipients who submit an all-race neutral goal for FY 2006 because they lack sufficient evidence of discrimination to ensure that this evidence-gathering effort is completed expeditiously, in order to remain in compliance with their DBE obligations under Part 26.

* Studies to determine the presence of discrimination or its effects are often referred to as "disparity" or "availability" studies, though there can also be rigorous and valid studies which may have different names. Whatever label is applied to a study, however, the key point is that is be designed to determine whether evidence of the kind the 9th Circuit decision determined was essential to a DBE program including race-conscious elements exists.

QUESTION: What should recipients' studies include?

ANSWER:

Based on the 9th Circuit decision, recipients should consider the following points as they design their studies:

* The study should ascertain the evidence for discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged.

* The study should include anecdotal and complaint evidence of discrimination.

* Recipients may consider the kinds of evidence that are used in "Step 2" of the Part 26 goal-setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings.

* With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require a multivariate/regression analysis.

* The study should quantify the magnitude of any differences between DBE availability and participation, or DBE participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences.

*In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.

* Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal courts have approved in the past. These include the studies by Minnesota and Nebraska cited in Sherbrooke (cite) and the Illinois evidence cited in Northern Illinois Contractors (cite).

QUESTION: Can there be statewide or regional studies, as opposed to a separate study for each individual recipient?

ANSWER:

* If feasible, studies may be undertaken on a regional or statewide basis to reduce the costs that would be involved if each recipient conducted its own separate study.

* We would expect that each State DOT would conduct a statewide study. Such a study should be conducted in cooperation with transit and airport recipients in the state, so that the study would apply to recipients in all three modes.

* Larger transit and/or airport recipients may want to conduct their own study, since the demographics of large urban areas may differ from that of the state as a whole.

QUESTION: Will Federal funds help to defray the costs of recipients' studies?

ANSWER:

* Yes. FHWA, FTA, and FAA have all stated that the costs of conducting disparity studies are reimbursable from Federal program funds, subject to the availability of those funds..

* Recipients should contact their operating administration for more detailed information.